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In the

Supreme Court of the United States

October Term, 1956

No. 238

DEPARTMENT OF CONSERVATION AND DEVELOPMENT, DIVISION OF PARKS, COMMONWEALTH OF VIRGINIA, RAYMOND V. LONG, RANDOLPH ODELL, J. LINDSEY, PHILLIP ARMSTRONG, ET AL.,

Petitioners

v.

LAVINIA G. TATE, SAMUEL E. ROBINSON, LEON A. WOODHOUSE AND OTIS B. WATTS,

Respondents

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Department of Conservation and Development of the Commonwealth of Virginia, et al., respectfully pray that a writ of certiorari be issued out of and under the seal of the Court to review the decision of the United States Court of Appeals for the Fourth Circuit hereinafter set forth and represent as follows:

OPINIONS OF COURTS BELOW

The opinion of the Court of Appeals is found as *Department of Conservation and Development* v. *Tate*, 231 F. (2d) 615, and is printed as Appendix I to this petition.

The opinion of the District Court for the Eastern District of Virginia, at Norfolk, is found as *Tate* v. *Department of Conservation and Development*, 133 F. Supp. 53, and is printed as Appendix II of "Brief and Appendix on Behalf of Appellants," which is made a part of the record in this case in accordance with Paragraph 4 of Rule 21 of this Court. In accordance with Rule 23, paragraph 1(i) of this Court, it is not reprinted here.

STATEMENT OF JURISDICTION

The final decree of the District Court for the Eastern District of Virginia, at Norfolk, was entered on October 6, 1955, and the Court of Appeals for the Fourth Circuit affirmed said decree on April 9, 1956.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (June 25, 1948, c. 646, 62 Stat. 928).

QUESTIONS PRESENTED

I.

Were the respondents entitled to injunctive relief with respect to future actions of the State and an unknown lessee when there had been no equitable or legal rights of the respondents threatened thereby?

II.

Does the Fourteenth Amendment to the Constitution of

the United States require a State, when leasing its property, to provide in the lease, or otherwise, that the lessee must not discriminate against the members of any race?

III.

Do independent actions of a lessee fall within the "State action" prohibitions of the Fourteenth Amendment?

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent part of the Fourteenth Amendment reads as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 10-21.1 of the Code of Virginia, as amended (1954 Cumulative Supp., Vol. 3, p. 14), reads as follows:

> "The Director is hereby authorized and empowered, subject to the consent and approval of the Governor, to convey, lease or demise to any responsible individual, organization, association or corporation for such consideration and on such terms as the Board may prescribe, by proper deed or other appropriate instrument signed and executed by the Director, in the name of the Commonwealth, any lands or other properties held for general recreational or other public purposes by the Commonwealth, for the Department, or over which it

has supervision and control, or any part or parts thereof, or right or interest therein or privilege with respect thereto. The Governor is also hereby authorized and empowered to direct the discontinuance of the operation of any or all State parks when in his judgment the public interest so requires.

"(3) Any such conveyance, lease or grant herein authorized shall be subject to such further provisions, conditions, restrictions and reservations as may be approved by the Governor and prescribed by the Director."

STATEMENT OF THE CASE

The case below came on to be heard on April 26, 1955, and again on June 29, 1955, upon the complaint and amended and supplemental complaint of the respondents for declaratory judgment and a preliminary and permanent injunction and answer of the petitioners. The respondents prayed that the petitioners, their lessees, agents and successors in office be restrained from denying them and others similarly situated, the use and enjoyment of the Seashore State Park on account of race and color.

It was stipulated and conceded by counsel for the petitioners that the Seashore State Park, located in Princess Anne County, Virginia, is a state park maintained and operated as part of the recreational facilities under the supervision and control of the Department of Conservation and Development of the Commonwealth of Virginia, that the said Park is supported by public funds and is the only state park operated by the petitioners in Princess Anne County, Virginia.

It was further conceded by counsel that the respondents sought the use of the recreational facilities of the aforesaid Seashore State Park and that they were denied admission thereto solely because they were members of the Negro race.

Furthermore, the petitioners, in denying the respondents admission to Seashore State Park, admittedly violated the rights of the appellees guaranteed by the Fourteenth Amendment of the United States Constitution, as that amendment has recently been construed by this Court and the Court of Appeals for the Fourth Circuit.

On July 7, 1955, the District Court rendered its opinion, and on October 6, 1955, a final decree was entered enjoining not only the petitioners, but also unknown lessees of the petitioners. The District Court further ordered that if the Seashore State Park were leased, "the lease must not, directly or indirectly, operate so as to discriminate against the members of any race."

An appeal was taken from the above-mentioned decree and argument thereon was heard on March 21, 1956. On April 9, 1956, the Court of Appeals affirmed the decree of the District Court in a per curiam opinion.

The original bill of complaint for injunctive relief was filed in the District Court on June 21, 1951, and the petitioners filed their answer on July 16, 1951. The case was subsequently set for trial but upon the request of the respondents, it was continued generally. The case remained dormant on the docket until counsel for all parties received a notice of conference for trial assignment from the Clerk of the District Court stating that the case had been set for a pre-trial conference, report and fixing of date of trial in the Judge's Chambers at Norfolk, Virginia, on November 5, 1954.

At the hearing in the District Court on April 26, 1955, the petitioners filed the affidavit of Raymond V. Long, Director of the Department of Conservation and Development of the Commonwealth of Virginia, wherein it was stated that the Director had been empowered to enter into negotiations for the lease of the Seashore State Park. It was fur-

ther stated that the lease would not contain a provision which could be construed as restricting the use of the Park to members of the white race. The Director also stated in his affidavit that he had never made a statement to the press conceding that the segregation issue was a prominent factor in the decision to lease the Seashore State Park. This last statement was deemed material to the proceedings at that time, since at the hearing on the motion for preliminary injunction held on March 12, 1955, both counsel for the respondents and the District Court had referred to alleged newspaper reports concerning the reasons for leasing Seashore State Park.

After the affidavit was filed with the District Court on April 26, 1955, counsel for petitioners filed their motion to dismiss the preliminary injunction which had been granted on March 12, 1955, on the ground that there were no allegations in any affidavit or in the verified complaint showing specific facts that would result in immediate and irreparable injury to the respondents. The District Court did not rule upon this motion.

Thereafter, counsel for the petitioners stipulated the facts hereinabove set forth and stated that they would consent to a decree enjoining the petitioners either directly or through their agents, servants or employees, and each of them, their successors in office and their agents and employees, from refusing, on account of race or color to admit the respondents, and other Negroes similarly situated, to the Seashore State Park.

The respondents would not agree to such a decree but insisted that the decree of the District Court should also enjoin a lessee who was not a party to this action and was not, in fact, in existence. The District Court then directed counsel to submit briefs on the power of the Court to enjoin an unknown lessee, and stated that all parties would be given

the opportunity to present additional evidence if they so desired.

After briefs were submitted to the District Court, counsel for the respondents requested permission to interrogate the Director of the Department of Conservation and Development and also requested oral arguments in support of their brief. This hearing was set for June 29, 1955, at which time, the testimony of Raymond V. Long was taken.

The facts of the case are not in dispute. Seashore State Park, located in Princess Anne County, near Cape Henry, is the only one of nine State parks located in that area.

All of these parks have been maintained and operated under the supervision and control of the Department of Conservation and Development, an agency of the Commonwealth of Virginia. The parks were built and maintained by public funds, but in 1950 revenue bonds in the amount of $600,000 were issued to cover the erection of sixty-seven cabins throughout the State Park system at the cost of about $8,000.00 each. Nine of these cabins are at Seashore State Park, and it is estimated that a yearly revenue of approximately $8,000 is required to pay Seashore's proportionate share of the Revenue Bond expenditures. An outstanding indebtedness of about $415,000 remains. In case of default, there is no legal duty on the part of the State to pay the bondholders. They are payable only out of revenue derived from the rental of cabins. The trust indenture, however, gives the bondholders wide authority, and under certain circumstances, the trustee may take over and operate the cabins on behalf of the bondholders.

The present litigation arose when the respondents were refused admittance to Seashore State Park, solely by reason of the fact that they were members of the Negro race. Between this incident on June 16, 1951, and the time the case finally came before the District Court, the State of Virginia, real-

izing it could not operate the parks in a segregated manner, and feeling that it could not run the parks profitably on an unsegregated basis, had investigated the possibilities of leasing the park to a private lessee who would be bonded to guarantee sufficient income to meet the bond requirements. The lessee would be free to operate the park in any manner he saw fit.

The State possesses the power to lease its property under Section 10-21.1 of the Code of Virginia, as amended, and made a press release on February 25, 1955, indicating that the Park might be leased. In response to this information, eighteen applicants indicated interest in this matter. No lease had been drawn up or signed, however, nor did the State know who the prospective lessees were. It was intended that the lease would be a negotiated one, thus guaranteeing to the State the high quality of management and necessary experience that are a requisite in the running of recreational facilities. The provisions of the lease, however, had been discussed only in the most general terms.

The jurisdiction of the District Court for the Eastern District of Virginia, Norfolk Division, was invoked pursuant to Title 28, United States Code, Section 1343, and Title 28, United States Code, Sections 2201 and 2202.

ARGUMENT

I.

The Action of the District Court Was Premature for It Has No Authority to Dictate the Provisions, or the Operation of, a Lease That May Be Executed by the State at Some Future Time.

Section 2, of Article III, of the Constitution of the United States has been uniformly construed as prohibiting the

rendering of advisory opinions. Furthermore, the existence of an actual controversy is necessary for an adjudication of a constitutional issue. See, *United Public Workers* v. *Mitchell*, 330 U. S. 75, 89-90 (1947), and *Michael* v. *Cockerall*, 161 F. (2d) 163, 165 (4th Cir. 1947).

It is hard to conceive that the possibility of a discriminatory practice on the part of an unknown lessee, bound by a non-existent lease, could give the respondents a concrete legal issue upon which the District Court could render a decree. The record is devoid of probative facts which could tend to sustain the District Court's decree to that extent.

There are three elementary doctrines concerning the issuance of injunctions that the District Court has discarded in this proceeding.

First, "there is no power, the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issuance of an injunction." *Truly* v. *Wanzer*, 46 U. S. 141, 142-43 (1847) and *King* v. *Buskirk*, 78 F. 233, 235 (4th Cir. 1897).

Second "the plaintiff must show that the injury sought to be avoided by the injunction will be necessarily or practically certain, and not merely the probable, result of the acts whether intended or not." *United States* v. *Appalachian Electric Power Co.*, 107 F. (2d) 769, 790 (4th Cir. 1939). See, also, *Connecticut* v. *Massachusetts*, 282 U. S. 660, 674 (1931) and *Blease* v. *Safety Transit Co.*, 50 F. (2d) 852, 856 (4th Cir., 1931).

Third, courts will not apply their equitable powers merely to allay litgants' fears. *Irwin* v. *Dixon*, 50 U. S. 10 (1850) and *Brunswick* v. *Elliott*, 103 F. (2d) 746 (D. C. App. 1939).

The Commonwealth of Virginia, as already pointed out,

readily admits that the respondents had been denied admittance to Seashore State Park solely by reason of the fact that they were members of the Negro race. The petitioners also admit that such an act constitutes state action which is properly enjoinable by the District Court. However, the record in the proceedings below show that there is no lease, thus there can be no lessee. The respondents have not been denied admission to the park by any lessee for any reason whatsoever, nor does the record show that there is any reasonable certainty that such an action will take place. Under such circumstances, it is inconceivable that the respondents have been so injured or so threatened with injury as to warrant the enjoining of an unknown lessee, or to warrant the mandate directing that if the park is leased, "the lease must not, directly or indirectly, operate so as to discriminate against the members of any race."

This unwarranted injunctive relief is based on mere conjecture, speculation and hypothetical threats. It is certainly not based on the evidence in the record or on any legal authority or sound reasoning. At best, it is premature.

Generally speaking, the relation of landlord and tenant, or lessor and lessee, is one which exists between two independent parties and does not involve an agency relation, a master-servant relation, an employer-employee relation, or a licensor-licensee relation. The lessor transfers both possession and right of possession. 11 M. J., Virginia and West Virginia, Landlord and Tenant, Section 29, p. 684. See also, 51 C. J. S., Landlord and Tenant, Section 2, p. 510.

There was no evidence before the District Court that there would be anything other than a normal landlord-tenant relation if the petitioners should lease the Seashore State Park. Absent such evidence, it is clear that the Court did not have the power to include an unknown lessee in its injunction order.

If, of course, at a later date the petitioners do lease the Seashore State Park and it is found, as a fact, that Negroes are excluded and that the normal lessor-lessee relation does not exist, and there is privity between the petitioners and the then known lessee, contempt proceedings could be brought against the petitioners, as well as the so-called lessee, even though the latter was not a party defendant below. This is true, since the petitioners conceded that they should be enjoined from denying admission to Negroes on racial grounds.

The District Court stated that it was not necessary to decide whether it was proper to enjoin an unknown lessee in this case, since the lessors were before the court. The language of the final decree, to-wit: "* * * the lease must not, directly or indirectly, operate so as to discriminate against the members of any race, * * *" does by indirection what the court could not accomplish directly. It not only restricts the State, but it restricts an unknown lessee.

Section 10-21.1 of the Code of Virginia provides that a lease shall be subject only to the conditions, restrictions and reservations prescribed by the Director of the Department of Conservation and Development and approved by the Governor. No State would intentionally write a provision in any lease that would violate the Federal Constitution or any Federal or State law. If the rights of any citizen of this State are denied because of any lease or any action on the part of the State, such citizen can always go into Court and ask for protection. Until, however, such rights are denied or have been threatened, no action will lie. This is the situation there.

The District Court has placed the cart before the horse, and has attempted to decide a purely abstract question, which is premature at this time because of lack of evidence.

II.

State Action Under the Fourteenth Amendment

The record is devoid of any evidence that the State has acted inbad faith; that the respondents will be injured; or that a prospective lessee will be an agent of the State, rather than an ndependent principal. Yet the Courts below, in their opinions have relied upon "state action" cases that were based upon facts that either indicated bad faith on the part of the "state" or clearly showed privity between the lessor and lesse, or both.

Subjet to constitutional restraints, a State may dispose of its property as any private citizen. The State's power to lease Seashore State Park cannot be denied. See Section 10-21.1 of the Code of Virginia, as amended.

Individual invasion of individual rights is not protected by the fourteenth Amendment. *Civil Rights Cases*, 109 U. S. 3, 11 (1883). Thus, the only protection against discrimination that the District Court could afford the respondents is protetion against discrimination by the Commonwealth of Virgnia. *United States* v. *Williams*, 341 U. S. 70, 77 (1951).

The question to be decided, then, is whether or not the actions of an independent lessee, in operating Seashore State Park inany manner he saw fit, constitute "state action."

The precise question of what constitutes "state action" under the Fourteenth Amendment has come before the courts many times, and reasonably clear and definable lines of demarcation have appeared. Thus, if a state court enforces aprivate restrictive covenant, it will be "state action." *Shelley v. Kraemer*, 334 U. S. 1 (1948); and where a State and university are closely tied, the amendment will apply. *Missouri, ex rel. Gaines* v. *Canada*, 305 U. S. 337 (1938).

See, also, *Rice* v. *Sioux City Memorial Cemetery*, 349 U. S. 70 (1955); *Snowden* v. *Hughes*, 321 U. S. 1 (1943); *Raymond* v. *Chicago Traction Co.*, 207 U. S. 20 (1907); *Barrows* v. *Jackson*, 346 U. S. 249 (1953); *Terry* v. *Adams*, 345 U. S. 461 (1953). But private, individual, or corporate affirmative action without State support will not be considered "state action." *Dorsey* v. *Stuyvesant Town Corporation*, 229 N. Y. 512, 87 N. E. (2d) 541 (1949), *cert. denied*, 339 U. S. 981 (1950); *Norris* v. *Mayor and City Council of Baltimore*, 78 F. Supp. 451 (D. Md. 1948); see, also, *Barney* v. *City of New York*, 193 U. S. 430 (1904).

While the petitioners readily admit that they were properly enjoined from denying the respondents, by reason of race, the right to use and enjoy the facilities of the Seashore State Park, it is earnestly contended that the actions of an independent future lessee are not limited by the provisions of the Fourteenth Amendment. Accordingly, the District Court has no authority to limit the actions of a future lessee, either directly or indirectly, under the facts of this case.

Modern social concepts have caused an ever-increasing area wherein Federal courts have declared "state action" to exist, but, while conclusions have been varied, the test of "state action" has remained constant. A factual analysis is the key to proper determination of this question.

Once there is a material identification or a substantial degree of control by the State over so-called independent actions of a private individual or association, those actions become state actions within the meaning of the Fourteenth Amendment.

For example, in *Shelley* v. *Kraemer*, *supra*, there was a substantial degree of state control, since there was judicial enforcement by state courts of restrictive covenants against certain races. However, in *Dorsey* v. *Stuyvesant Town Corporation*, *supra*, it was held that there was no substantial

degree of control by the "state" and thus no "state action," even though a life insurance company had obtained land from the City of New York upon which to build a housing development and had obtained a tax exemption on the property.

In *Kerr* v. *Enoch Pratt Free Library of Baltimore City*, 149 F. (2d) 212 (4th Cir. 1945), the court below found "state action" in that the State, through the City of Baltimore, continued to supply a private library corporation with means of existence. Thus, there was a substantial degree of control by the State.

But, in *Norris* v. *Mayor and City Council of Baltimore*, *supra*, the District Court found no substantial degree of control by the state, since the mechanical institute was a private corporation and was not subject to control of public authority, notwithstanding receipt of public funds in consideration of free scholarships and favored treatment as lessee of public property.

The case of *Terry* v. *Adams*, *supra*, is an example of "state action" because of material identification. There, it was held that a Texas political organization which duplicated the State's election process could not exclude Negroes from voting in its "primary." The organization was materially identified with the State through the Democratic Party.

The conclusions reached in the cases relied upon by the District Court in its opinion are justified under the material identification test; but the facts therein are readily distinguishable from the facts in the instant case. In the swimming pool cases, *Culver* v. *City of Warren*, 83 N. E. (2d) 82 (Ohio 1948) and *Lawrence* v. *Hancock*, 76 F. Supp. 1004 (D.C.S.D. W. Va. 1948), it was found that the private associations were mere municipal instrumentalities through

which the cities operated the pools. Both of the associations were non-profit, both were formed shortly before the leases were executed, and both paid nominal rent.

In the *Lawrence* case, all of the net revenues derived by the lessee were required to be used to improve and develop the property and the evidence clearly showed that the municipality was acting in bad faith, the purpose of the lease being to discriminate against Negroes.

In the *Culver* case, the city had the duty to make repairs. Further, it was found that the lessee confined approved applications to members of the white race, and Negro veterans were rejected. The court, in effect, held that there was merely a "colorable" lease.

In the instant case, the Department of Conservation and Development has advertised for bids from individuals or profit-making associations or corporations for the purpose of procuring a lessee who will be able to operate the park at sufficient profit to guarantee the financial return of a minimum of $8,000.00 per annum, which amount the State is required to pay the holders of the revenue bonds issued to finance the construction of eight cabins at Seashore State Park.

Since there is evidence that there will be normal lessor-lessee relationships and that the Department of Conservation and Development, in fact, does not know who has made application to lease the park, there can be no charge of bad faith. Furthermore, under such circumstances, there is no material identification or substantial degree of control by the State to warrant a finding of "state action."

This Court's previous decisions and the decisions of lower Federal courts do not justify the decisions of the courts below. The so-called "state action" doctrine has been extended for the first time to unknown lessees of the State, acting as

independent parties. The State should be free to dispose of its property under applicable State law without interference from the Federal courts. The decision in the instant case does not permit this. To the contrary, the decision below indicates that the State is now compelled to place an affirmative provision in every lease to which it is a party stating, in terms, that the lessee will not discriminate against the members of any race, whether the lease be for a term of months or for a period of ninety-nine years.

Accordingly, it is respectfully submitted that the court below has decided an important question under the Fourteenth Amendment in a way that has extended, and, in fact, departed from, applicable decisions of this Court, and thus calls for the exercise of the supervisory power of this Court.

Respectfully submitted,

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Dated: July 5, 1956.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the aforegoing petition have been served by mailing the same, with first class postage prepaid, to the following counsel of record:

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